

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOSE R. PADILLA,

Plaintiff,

v.

DR. GARY MAIER, DR. DALIA SULIENE
and C.O. BITTLEMAN,

Defendants.

OPINION and ORDER

11-cv-425-bbc

In this civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Jose Padilla is proceeding on claims that defendants that defendants Gary Maier and Dalia Suliene failed to provide him adequate medical care and that defendant C.O. Bittleman used excessive force against him while he was incarcerated at the Columbia Correctional Institution. Now before the court is defendants' motion for summary judgment on their defense that plaintiff has failed to exhaust his administrative remedies. Dkt. #37.

Plaintiff's response does not address defendants' arguments except to say that he "did his remedies" and exhausted his complaints against defendants before filing suit. Dkt. #45. However, he does not provide facts or explanations supporting these statements. Because

plaintiff has not disputed defendants' proposed findings of fact in any meaningful way, defendants' facts must be taken as undisputed. Procedure to Be Followed on Motions for Summary Judgment, II.A, II.B and II.C and Memorandum to Pro Se Litigants Regarding Summary Judgment Motions, attached to Preliminary Pretrial Conference Order, dkt. #21.

After considering the undisputed facts and defendants' arguments, I conclude that plaintiff has failed to exhaust his administrative remedies with respect to his claims against defendants Maier and Bittleman. Therefore, I will grant defendants' motion for summary judgment with respect to these defendants. However, defendants have not shown that plaintiff failed to exhaust his administrative remedies with respect to his claim against defendant Suliene. Therefore, I will deny their motion for summary judgment with respect to defendant Suliene.

OPINION

Under 42 U.S.C. § 1997e(a), a prisoner must exhaust all available administrative remedies before filing a lawsuit in federal court, meaning that the prisoner must "file complaints and appeals in the place, and at the time, the prison's administrative rules require." Burrell v. Powers, 431 F.3d 282, 285 (7th Cir. 2005) (citing Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002)). To satisfy exhaustion requirements, the prisoner must give the prison grievance system "a fair opportunity to consider the grievance," which

requires that the complainant “compl[y] with the system’s critical procedural rules,” Woodford v. Ngo, 548 U.S. 81, 95 (2006) and that the grievance “contain the sort information that the administrative system requires.” Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002). Section 1997e(a) requires more than simply notifying the prisoner grievance system once; a prisoner must take any administrative appeals available under the administrative rules. Burrell, 431 F.3d at 284-85. Because exhaustion is an affirmative defense, defendants bear the burden of establishing that plaintiff failed to exhaust. Jones v. Bock, 549 U.S. 199, 216 (2007).

Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner within 14 days after the occurrence giving rise to the complaint. Wis. Admin. Code § DOC 310.09. The complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements, recommend a disposition to the appropriate reviewing authority (the warden or the warden’s designee) or direct the inmate to attempt to resolve the complaint informally. Id. at §§ 310.07(2), 310.09(4), 310.11, 310.12. If the institution complaint examiner makes a recommendation that the complaint be granted or dismissed on its merits, the appropriate reviewing authority may dismiss, affirm or return the complaint for further investigation. Id. at § 310.12. If an inmate

disagrees with the decision of the reviewing authority, he may appeal. Id. § 310.13.

Plaintiff was granted leave to proceed on claims that (1) defendant Bittleman used excessive force against him; (2) defendant Maier failed to give him adequate mental health care and encouraged plaintiff to cut himself; and (3) defendant Suliene failed to give him adequate medical care by refusing to treat him for the staples in his leg. Defendants have submitted plaintiff's complete inmate complaint history report, dkt. #39-1, which shows that plaintiff did not file an inmate grievance related to defendant Bittleman's alleged excessive force. Therefore, I will dismiss without prejudice plaintiff's claim against Bittlement for failure to exhaust his administrative remedies. *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004) ("[A]ll dismissals under § 1997e(a) should be without prejudice.").

The report shows that plaintiff filed inmate grievances related to his claims against defendants Maier and Suliene. However, defendants contend that the grievance related to defendant Maier's treatment was untimely and the grievance related to defendant Suliene's treatment decisions was premature.

A. Complaint Alleging Defendant Maier Gave Improper Treatment

On February 7, 2011, plaintiff filed offender complaint CCI-2011-2701, dkt. #39-3, alleging that on December 10, 2009, defendant Maier told plaintiff to cut himself with little cuts in order to manage his psychiatric problems. Plaintiff stated that the unsafe techniques

were causing him mental and physical harm. The complaint examiner rejected plaintiff's complaint, stating that plaintiff's general complaints about psychiatric treatment had been addressed in prior inmate complaints and that his specific complaints about Maier's treatment were untimely. The complaint examiner cited Wis. Admin. Code § DOC 310.11(5)(d), which states that a complaint may be rejected if "[t]he inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provides no good cause for the [inmate complaint examiner] to extend the time limits." Plaintiff appealed and the warden affirmed the rejection.

Plaintiff does not deny that he failed to file a grievance regarding his claim against defendant Maier within the deadline imposed by state regulations. Additionally, he has suggested no reason why the deadline should not apply in his case. Thus, it is undisputed that plaintiff failed to exhaust his administrative remedies by failing to complete the grievance process "in the place, and at the time, the prison administrative rules require," Pozo, 286 F.3d at 1025. Therefore, I will dismiss his claim against Maier without prejudice.

B. Complaint Related to Defendant Suliene's Failure to Remove Staples

On January 7, 2011, plaintiff filed offender complaint CCI-2011-2701, dkt. #39-2, complaining that while he was on observation status, he was not allowed to see psychological services unit staff for his mental distress. As a result, he pushed staples into his hand, head

and leg. Plaintiff alleged that he wrote to health services unit staff and they took the staples out of his hand and head but could not remove the staples from his leg. Plaintiff stated that the pain was “killing” him and that the health services unit refused to send him somewhere to get the staple out of his leg. Plaintiff stated that it was hard for him to walk to the library or get out of his bed at times.

The inmate complaint examiner who investigated plaintiff’s complaint recommended that the complaint be dismissed. She noted that she had contacted the health services manager, who told the complaint examiner that plaintiff had been seen by health services staff regarding the staples in his leg and that the physician who assessed plaintiff ordered a “class III” for possible off-site services. At the time of the complaint examiner’s investigation, the class III request had not yet been decided. The inmate complaint examiner found that care and treatment were being provided to plaintiff and that he had been given medications for pain relief. Finally, she noted that she was not in the position to question or judge the merits, opinions or treatments offered by the trained, professional health services staff.

On January 11, 2011, Cynthia Thorpe, the Bureau of Health Services Regional Coordinator, reviewed the inmate complaint examiner’s decision and affirmed it with modification that the health services unit should notify Thorpe when a decision was made regarding the class III request. Plaintiff appealed Thorpe’s decision to the corrections

complaint examiner, who recommended dismissal of the appeal. The corrections complaint examiner noted that plaintiff had provided no information on appeal to warrant a recommendation overturning the decision and also noted that although the staple had not yet been removed, the health services staff had not ignored plaintiff's complaints. Additionally, the complaint examiner noted that plaintiff had been given medication to reduce his pain and a class III request had been made. Thus, plaintiff had not been refused treatment. Relying on the findings and recommendation of the corrections complaint examiner, the deputy secretary dismissed plaintiff's appeal on February 2, 2011.

In the brief in support of their motion for summary judgment, defendants state that "[t]here is no question that [plaintiff] complained about the care he was receiving from Dr. Suliene and that he exhausted his appeal of that grievance." Dfts.' Br., dkt. #38, at 7. Nonetheless, defendants contend that plaintiff's "complaint was premature because no final decision had been made about the treatment" for plaintiff's leg. Id. at 7-8. Thus, defendants contend, plaintiff should have filed a new grievance after a final treatment decision had been made; because he did not, plaintiff's claim against defendant Suliene should be dismissed for plaintiff's failure to exhaust his administrative remedies.

Defendants' argument is not persuasive. Defendant cites no authority for the proposition that an inmate complaint examiner can reject an inmate's complaint regarding inadequate health care on the ground that the complaint is "premature" or unripe.

Moreover, even if I assume that ripeness would have been an appropriate basis for rejection under the circumstances, plaintiff's complaint was not rejected because it was premature or unripe. He was not instructed to file a new grievance after a decision had been made regarding the class III request. Rather, both the inmate complaint examiner and corrections complaint examiner considered plaintiff's complaint on the merits and dismissed it after concluding that he had been provided adequate treatment. This response relieved plaintiff of any requirement to file a new grievance. When a prison administrator "resolves [a prisoner's grievance] on the merits, the federal judiciary will not second-guess that action, for the grievance has served its function of alerting the [prison] and inviting corrective action." Adefeyinti v. Reed, 2009 WL 3046805, *7 (W.D. Wis. Sept. 17, 2009) (citing Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004)). In sum, defendants have not shown that plaintiff failed to exhaust his administrative remedies with respect to his claim against defendant Suliene. Therefore, I will deny defendants' motion for summary judgment on that claim.

ORDER

IT IS ORDERED that the motion for summary judgment, dkt. #37, filed by defendants Gary Maier, Dalia Suliene and C.O. Bittleman is GRANTED IN PART and DENIED IN PART. Defendants' motion is GRANTED with respect to plaintiff Jose

Padilla's claims against defendants Gary Maier and C.O. Bittleman and plaintiff's claims against Maier and Bittleman are DISMISSED without prejudice. Defendants' motion is DENIED with respect to plaintiff's claim against defendant Suliene.

Entered this 8th day of December, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge